

Invasion of Privacy for the Greater Good: Why *Bartnicki v. Vopper* Disserves the Right of Privacy and the First Amendment

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"Private speech," as used in this note and by the Supreme Court in Bartnicki v. Vopper, is expression containing an expectation of privacy. Restrictions on the dissemination of illegally intercepted conversations incentivize private speech by relieving individuals of the fear that their private conversations will be imported into the public sphere. In Bartnicki v. Vopper, the Supreme Court struck down one such restriction as violative of the First Amendment.

Theories of First Amendment protection can be roughly divided into "collectivist" and "autonomy-based" variants. In the Daily Mail Cases, the Supreme Court repeatedly gave priority to the First Amendment, grounded in a collectivist theory, over the right of privacy. However, the nature of those cases did not give the Court an opportunity to articulate a different theory. Rather than reevaluate its allegiance to the "Fourth Estate" function of the media in light of the tension within the First Amendment precipitated by the facts of Bartnicki, the Court unreflectively adopted the theory undergirding the Daily Mail Cases. Although the decision does hold out some hope for privacy advocates, it does little to protect the interest in private speech as such. This is bad policy given the increased reliance on vulnerable communications technologies and the increased ability of private individuals to exploit those vulnerabilities. A First Amendment theory grounded in respect for individual autonomy would remedy this situation, particularly by requiring a reassessment of what constitutes a "public matter," thereby prioritizing the individual's interest in expression over the public's interest in "listening in."

"You already have zero privacy—get over it."¹

"Whatever happened to freedom of speech?"²

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¹ *As Technology Advances, Users' Right to Privacy Recedes: Everyday Devices & Software May Have Telltale I.D. Numbers*, STAR-TRIBUNE (Minneapolis-St. Paul), Mar. 14, 1999, at B2.

² Andrew P. Napolitano, *Whatever Happened to Freedom of Speech? A Defense of "State Interest of the Highest Order" as a Unifying Standard for Erratic First Amendment Jurisprudence*, 29 SETON HALL L. REV. 1197 (1999).

I. INTRODUCTION

The new era of interconnectivity has had its share of surprises, some baleful and Orwellian,³ others inspiring and Dantean.⁴ The impact of communications technologies upon privacy was not, however, unforeseen.⁵ At a superficial level, the iconography of privacy and its invaders has changed. To the chagrin of pulp novelists, the days of the "stakeout" are gone.⁶ New technology permits more remote eavesdropping.⁷ On a more fundamental level, the technology upon which the new surveillance feeds, cellular, appears to have lowered privacy expectations.⁸ Telephone conversations that were once carried on in private or near-private are now carried out on a public stage: busy sidewalks, malls, libraries, and movie theaters.⁹ However, there is still reason to believe that people

³ See Frank James, *Safety Versus Privacy: FCC Wants Phones to Reveal Location*, DENVER POST, Sept. 13, 1999, at F1 (privacy advocate appearing before congressional hearing tells of Japanese company experimenting with a web site that would "allow people to enter a mobile phone user's number to learn his whereabouts just because they were curious").

⁴ Although tragically unsuccessful, a team of experts utilized cell phone tracking technology to search for cell phone signals following the September 11 terrorist attacks in the hope of locating survivors in the rubble. See Loring Wirbel, *For Sept. 11 Wireless Team, A Payoff in Lives, Lessons*, ELEC. ENG'G TIMES, Dec. 3, 2001, at 20. The team also searched for police radio signals "and even keyless car door openers." *Id.*; see also James, *supra* note 3 (Using cell phone tracking technology, "a parent might find a child or a worried family member might locate an elderly relative victimized by Alzheimer's.").

⁵ See, e.g., GEORGE ORWELL, NINETEEN EIGHTY-FOUR, A NOVEL (1949).

⁶ See *FBI Has Tools for Remote Eavesdropping on Calls, E-Mail*, CHARLESTON GAZETTE & DAILY MAIL, Oct. 1, 2001, at 3D [hereinafter *FBI Has Tools*] (quoting Peter Swire, former Chief Counselor for Privacy in the United States Office of Management and Budget: "In the old days, the FBI had to go out and have a truck sit outside a suspect's house in the rain The van that says Joe's Pizza might be suspicious, sitting outside the house for 25 days in a row."); see also Alicia Gray, *Privacy Concerns Growing in Net Age*, STAR-LEDGER (Newark, N.J.), Aug. 9, 2000, at 25 (noting that e-mail tracking technology has eliminated the detective's need to peruse the suspect's garbage for personal information).

⁷ *FBI Has Tools*, *supra* note 6.

⁸ Simson Garfinkel, *The Undefended Airwaves: Security Still Lacking*, MIT'S TECH. REV., Sept. 1, 2001, at 22 (noting that cellular industry officials "say that one reason they don't spend the extra money on encryption [technology to prevent interception of cellular phone calls] is because wireless users don't care much about it"); Pete Waldmeir, *Universal ID Card Has Value if the Government Collects Only Selected Data*, DETROIT NEWS, Feb. 11, 2002, at 1C (noting the "irony" that citizens unhappy with corporate sector privacy intrusions are more tolerant of invasions instituted by the government in the wake of September 11).

⁹ See A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1502 (2000) (hypothesizing that consumers will always sell personal information because the marginal value to the individual not selling (i.e., maintaining privacy) will always be exceeded by the value to the merchant of individual data in aggregate).

are still concerned with the *involuntary* outflow of private information into the public sphere.¹⁰

It may come as something of a surprise then, given the suspicion with which such entities are held in matters of privacy,¹¹ that federal and state governments have made efforts to stem the involuntary outflow of personal information into the public sphere. One (direct) way to accomplish this end is to sanction the deliberate interception of private communications. Another (indirect) way is to sanction the subsequent publication of intercepted communications. The purpose of the latter method is to “dry up the market” for illegally obtained information.¹² To this end, numerous states enacted laws sanctioning the illegal acquisition and subsequent publication of private telephone conversations.¹³ Many of these laws are modeled on the Omnibus Crime Control and Safe Streets Act of 1968 and subsequent amendments.¹⁴ The constitutional validity of the method of deterrence exemplified by these statutes was considered in a recent Supreme Court decision, *Bartnicki v. Vopper*.¹⁵ The Court’s decision invalidating the proscription of

¹⁰ Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1100 (1999) (“These may be the worst of times for privacy, in that there appears to be so little of it. Yet these may also be the best of times, because the collective sense that privacy is being lost appears to be generating a cultural backlash.”).

¹¹ See *Bartnicki v. Vopper*, 532 U.S. 514, 522 (2001) (“[S]ophisticated (and not so sophisticated) methods of eavesdropping on oral conversations and intercepting telephone calls have been practiced for decades, primarily by law enforcement authorities.”); CHARLES J. SYKES, *THE END OF PRIVACY* 155 (1999) (“Historically the greatest threat to personal privacy has been the State. It still is. Jealous of its own secrets, the government covets ours.”). The remarks of Senator Church in 1975 are typical, both in the subject of their concern and their apocalyptic overtones:

“[The] capability at any time could be turned around on the American people and no American would have any privacy left, such [is] the capability to monitor everything: telephone conversations, telegrams, it doesn’t matter. There would be no place to hide. The technological capacity that the intelligence community has given the government could enable it to impose total tyranny. . . . Such is the capability of this technology.”

Lawrence D. Sloan, Note, *Echelon and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 DUKE L.J. 1467, 1467 (2001) (quoting Sen. Frank Church on *Meet the Press* (NBC television broadcast, Aug. 17, 1975), reprinted in JAMES BAMFORD, *THE PUZZLE PALACE* 379 (1982)).

¹² A similar approach was adopted by states combating child pornography. See *New York v. Ferber*, 458 U.S. 747, 760 (1982) (“The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”); see also, *infra* note 146 and accompanying text.

¹³ See, e.g., CAL. PENAL CODE § 631 (West 1999); OHIO REV. CODE ANN. § 2933.52(A)(3) (West 1997); TEX. PENAL CODE ANN. § 16.02 (Vernon 2001).

¹⁴ 18 U.S.C. § 2511 (2000).

¹⁵ 532 U.S. 514 (2001).

subsequent publication on First Amendment grounds foreclosed one avenue by which state and federal governments can protect the privacy of their citizens.

Unlike other victories for the First Amendment, however, this victory comes at some *cost* to freedom of expression. Because the publication of private speech entails some embarrassment to the original speaker, there is a disincentive to “speak originally,” both in the sense of speaking at all (“I could have avoided the whole mess by shutting up”) and speaking in unconventional, or disapproved modes (“If I’d spoken euphemistically, I could have lessened my embarrassment”). Private speech is thereby reduced and sanitized, and this is done in the interest of an “uninhibited, robust and wide-open”¹⁶ debate on public issues.

The societal movement toward a more “transparent”¹⁷ society is the catalyst driving private speech into the open, and *Bartnicki* and its forebears were a proving ground for government efforts to check the flow. The government lost. Hurrah? Perhaps not. *Bartnicki* sounds an ominous note for the very idea of private speech, just as the idea begins to assume greater relevance. The threat to *public* speech has never been difficult to conceptualize: government officials seizing books,¹⁸ shutting down printing presses,¹⁹ imprisoning dissidents.²⁰ Although the concept of the “bug” has been with us for sometime, it is only with the advent of cellular technology, and the threat of our conversations being plucked out of the air like fruit on the vine,²¹ that the threat to private speech has fully materialized. What *should* happen when the media, the bastion of public speech values, disseminate that ill-gotten fruit is the subject of this note.

This note begins by defining “private speech”: what it is and why it is covered by *two* Amendments to the Constitution. A localized tour through the Supreme Court’s First Amendment precedents follows. The purpose is to highlight certain commonalities that emerge from the Court’s treatment of the tension between the press’ right to publish matters of public importance and the individual’s right of privacy. Of central importance for the purposes of this note is

¹⁶ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

¹⁷ DAVID BRIN, THE TRANSPARENT SOCIETY 301 (1998).

¹⁸ See Robert Spoo, Note, *Copyright Protectionism and Its Discontents: The Case of James Joyce’s Ulysses in America*, 108 YALE L.J. 633 (1998).

¹⁹ See *Sri Lanka Censorship Struck Down*, BBC News, at http://news.bbc.co.uk/hi/english/world/south_asia/newsid_812000/812729.stm (last visited May 19, 2003) (printing press of newspaper critical of Sri Lanka government “shut down after the publication of a report titled War in Fantasy Land”).

²⁰ See *Cuba Plans to Try Four Prominent Dissidents for Sedition Soon*, Human Rights Watch, at <http://www.hrw.org/press98/oct/cuba1016.htm> (last visited May 19, 2003) (imprisoning of Cuban dissidents for criticizing government).

²¹ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 308 (S.D.N.Y. 2000) (noting defendant’s publication, 2600: *The Hacker Quarterly*, published articles on how to intercept cellular phone calls); see also 2600: *The Hacker Quarterly*, at <http://www.2600.com> (last visited May 19, 2003) (online version of *The Hacker*).

the Supreme Court's steadfast reliance upon democratic theories of First Amendment protection: The Court shields the press from liability because it performs a vital "Fourth Estate"²² function.

This note then examines *Bartnicki* in some detail, with particular emphasis on what it expressly does *not* hold. Taking the Court's intimations as a cue, this note will explore, via two hypotheticals, situations in which a privacy enhancing statute might survive the *Daily Mail* test. Concluding that these protections are marginally valuable to the right of privacy and valueless to private speech as such, this note argues that the Supreme Court's analysis of what constitutes a "public matter" should be informed by First Amendment values grounded in personal autonomy.

II. WHAT IS PRIVATE SPEECH & WHY IS IT PROTECTED?

A few words about "private speech." As used by the Supreme Court in *Bartnicki*, and as developed in this note, "private speech" is expression containing an expectation of privacy.²³ The phrase appears oxymoronic at first glance: Expression typically involves a speaker and listener; consequently every speech act is itself a surrender of privacy. However, this contradiction is at the core of privacy, and literalism (or extremism) has not curtailed its development.²⁴

²² C. EDWIN BAKER, HUMAN LIBERTY & FREEDOM OF SPEECH 225 (1989).

²³ Cf. *Legal Servs. Corp. v. Carmen Valasquez*, 531 U.S. 533 (2001) (contrasting private speech from government speech). The Supreme Court has extended First Amendment protection to private conversations in other contexts. See, e.g., *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979) ("The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."); cf. T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 521 (1979) ("Private conversations are not, in general, a matter of freedom of expression, not because they are unimportant to us but because their protection is not the aim of this particular doctrine."). Obviously, how the "aim of the doctrine" is defined will dictate whether it extends to private expression. See *infra* notes 27–44 and accompanying text.

²⁴ See RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 130 (1992).

There is very little information in the universe that is *purely* "private." Even the most intimate facts about a person's life are likely to be known by someone. The Supreme Court has commented, "In an organized society, there are few facts that are not at one time or another divulged to another."

Id. (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989)). The Court in *Reporter's Committee* goes on to quote *Webster's Dictionary*, "information may be classified as 'private' if it is 'intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public.'" *Reporter's Comm.*, 489 U.S. at 764 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1804 (1976)).

Statutes protecting the right of privacy promote "private speech" by relieving citizens of the concern that their private conversations may be publicly exposed.²⁵ One such statute is the Omnibus Crime Act.²⁶ *Bartnicki*, on the other hand, promotes "public speech" by permitting media outlets to disseminate information without the fear of sanctions. Essentially, the issue is which party should bear the burden of "timidity and self-censorship."

Different theories have been offered for *why* speech (public or private) is or should be protected.²⁷ One theory characterizes freedom of expression as an engine for truth.²⁸ This "market place of ideas"²⁹ approach posits, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."³⁰ A related theory characterizes free speech as "essential to intelligent self-government in a democratic system."³¹ In the words of Justice Brennan, "the

²⁵ *Bartnicki*, 532 U.S. at 543 (Rehnquist, C.J., dissenting) ("'Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.'") (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 202 (1967)).

²⁶ See *supra* note 14 and accompanying text.

²⁷ See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970) (identifying four values served by freedom of expression, including self-fulfillment, discovery of truth, participation in the culture, and achievement of adaptable and stable community).

²⁸ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 786 (2d ed. 1988).

²⁹ *Id.*; see also *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 88 (1976) (Stewart, J., dissenting) ("Much speech that seems to be of little or no value will enter the market place of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom."); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

³⁰ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

³¹ TRIBE, *supra* note 28, at 786; see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) ("[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government."); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960) ("As the self-governing community seeks, by the method of voting, to gain wisdom in action, it can find it only in the minds of its individual citizens . . . [t]hat is why freedom of discussion for those minds may not be abridged."); Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 106-07 (2002) ("[I]deas about the watchdog role, the Fourth Estate, and self-government all support the goals and policies of investigative journalism and, hence, the constitutional power of the First Amendment to achieve these ends."); Jon Paul Dils, *The Press Clause and Press Behavior:*

First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government.”³² The free flow of information is necessary to ensure that public officials are acting with the informed consent of their constituents.³³

A third theory is grounded in the belief that “freedom of speech [is] an end in itself and [is] a constitutive part of personal and group autonomy.”³⁴ Proponents of this theory, or variations thereof, have faulted the democratic theory for exalting political over other forms of speech, whereas the First Amendment simply says, “speech.”³⁵ Moreover, free speech is valuable not only at the institutional level, but also at the level of individual decision-making.³⁶ To the

Revisiting the Implications of Citizenship, 7 COMM. L. & POL’Y 25, 27 (2002) (noting Supreme Court decisions recognizing role of First Amendment in self-government independent of expression); see also John R. Therien, Comment, *Exorcising the Specter of a “Pay-Per-Use” Society: Toward Preserving Fair Use and the Public Domain in the Digital Age*, 16 BERKELEY TECH. L.J. 979, 999–1000 (2001) (noting that courts rely upon this First Amendment theory to protect commercial speech). For simplicity’s sake, this note will refer to this as the “democratic theory.”

³² *Richmond Newspapers*, 448 U.S. at 587 (1980) (Brennan, J., concurring).

³³ See Alexander Meiklejohn, *The First Amendment Is Absolute*, 1961 SUP. CT. REV. 245, 255.

³⁴ TRIBE, *supra* note 28, at 788 (citing Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972)); see also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that the final end of the State was to make men free to develop their faculties.”); BAKER, *supra* note 22, at 50 (arguing that democratic theories of free speech are constrained by respect for individual autonomy); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992). Fried noted:

Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others. Autonomy is the foundation of all basic liberties, including liberty of expression.

Id. This note will refer to this as the “autonomy theory” of free speech protection.

³⁵ MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS*, 18 (1984) (“[T]he language of the First Amendment . . . says nothing about protecting only political speech.”).

³⁶ *Id.* at 22. As Professor Redish notes:

Free speech aids life-affecting decisionmaking, *no matter how personally limited*, in much the same manner in which it rids the political process. Just as individuals need an open flow of information and opinion to aid them in making electoral and governmental decisions, they similarly need a free flow of information and opinion to guide them in making other life-affecting decisions.

Id. (emphasis added). It must be noted, however, that Professor Redish’s theory of “self-realization” may permit the sort of private speech deterrence this note argues against. The self-realization of individuals, in Professor Redish’s theory, is effectuated as much by the receipt of

extent that the democratic process *itself* serves something, it serves the values of “self-rule” and “self-realization.”³⁷

These theories of First Amendment protection are not necessarily complimentary.³⁸ The democratic theory of free speech is in tension with the view that the First Amendment is grounded in respect for individual autonomy.³⁹ Similarly,⁴⁰ critics of the marketplace of ideas theory argue that some forms of

information as by expression. *Id.* at 50 (“[I]f an individual is given the opportunity to control his or her destiny, at least within certain bounds, he or she needs all possible information that might aid in making these life decisions.”). Consequently, self-censorship motivated by fear that private conversations may be overheard, recorded, and disseminated, might be justified if the information contained therein enabled others to “self-realize.” *See id.* at 80 (“Comments about a private individual may be relevant to numerous life-affecting decisions of others, such as whether to deal with him socially, enter into a business arrangement with him, or buy in his store.”). Presumably the comments of an individual would serve the same purposes. *Cf.* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1007 (1978) (“[O]n the liberty theory, the purpose of the first amendment is not to guarantee adequate information.”). On the other hand, Professor Redish concedes that “competing social concerns” may outweigh the interest in free speech, but that courts should “balance with ‘a thumb on the scales’ in favor of speech.” REDISH, *supra* note 35, at 55. What does that mean when speech is on both sides of the scale? This note argues that the Supreme Court relied (albeit reflexively rather than deliberately) on collectivist First Amendment theories to tip the scales in favor of public speech in *Bartnicki*. *See infra* Parts III, IV. For a variety of societal reasons, this note argues that this is the wrong outcome. *See infra* Part V.B.

³⁷ REDISH, *supra* note 35, at 21–22 (arguing that the democratic process serves the value of self-rule, as such, and the development of the individual’s human faculties).

³⁸ Obviously, this list of theories is not exhaustive. Additionally, this note will subsume under more general headings particular variants of autonomy-based and collectivist theories. *Cf.* Baker, *supra* note 36, at 964 (“liberty model”); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521 (“checking theory”).

³⁹ *See* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 27 (2001) (noting that intellectual property protection in information economy shatters “the neat alignment of personal autonomy and democratic discourse—the two values most broadly understood to animate the Amendment”); Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993). Post writes:

Meiklejohn’s work displays a structure of analysis that is common to all versions of the collectivist theory of the First Amendment. The theory postulates a specific “objective” for public discourse, and it concludes that public debate should be regulated instrumentally to achieve this objective. The objective thus stands distinct from, and prior to, any process of self-determination that happens within public discourse.

Id. at 1119; *see also* Fried, *supra* note 34, at 226–27 (noting free expression is the liberty guaranteed by the First Amendment, “uninhibited discussion of political matters” is the effect of that liberty).

⁴⁰ Fried, *supra* note 34, at 253 (“[The] instinct of the civic republican to assert the primacy of community by ramming beliefs and values down people’s throats is thus the positive version of the negative instinct to punish those who would speak thoughts the community abhors.”).

private speech should not receive First Amendment protection.⁴¹ Both arguments, the argument *for* the democratic theory and the argument *against* the marketplace of ideas theory, are at least ambivalent concerning the values of privacy and private speech. Under the former, private conversations *that remain private* are valueless.⁴² Under the latter, the content of some private speech is such that it does not deserve protection.⁴³ This note argues that the former is ascendant in the Supreme Court's jurisprudence at a time when private speech is especially vulnerable.⁴⁴

⁴¹ The "marketplace of ideas" theory has been criticized for not taking into account "unfair markets."

The real problem is that the idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market (like a computer virus, sick cattle, or diseased wheat). Racism is irrational and often unconscious. Our belief in the inferiority of non-whites trumps good ideas that contend with it in the market, often without our even knowing it. In addition, racism makes the words and ideas of blacks and other despised minorities less saleable, regardless of their intrinsic value, in the marketplace of ideas. It also decreases the total amount of speech that enters the market by coercively silencing members of those groups who are its targets.

Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 468; *see also* RICHARD DELGADO & JEAN STEFANICIE, MUST WE DEFEND NAZIS? 66–68 (1997) (discussing theory that racist speech subordinates minority groups thereby retarding the marketplace for their ideas); Martha Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power?—An Essay for Kenneth Karst*, 47 UCLA L. REV. 1253, 1262 (2000) (opining that stereotypes jeopardize confidence that market will sort out good from bad ideas); John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. J. 97, 109 (1998) (suggesting minorities lack access to marketplace of ideas).

⁴² The "flow" of information between private interlocutors can only indirectly serve the collective interest in self-governance. Even this indirect benefit (i.e., the potential to create one or two more informed voters) is outweighed by the benefit that inheres in "sharing with the class." *Cf.* REDISH, *supra* note 35, at 22–26 (arguing that the value of free speech in the private sphere is at least as significant as it is in the political sphere).

⁴³ *See supra* note 41 and accompanying text.

⁴⁴ It has been argued that the First Amendment has nothing to say about this erosion if non-governmental actors cause it. *See* Eugene Volokh, *Symposium: Cyberspace and Privacy: A New Legal Paradigm? Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1107 (2000) ("The Constitution presumptively prohibits government restrictions on speech and perhaps some government revelation of personal information, but it says nothing about interference with speech or revelation of personal information by nongovernmental speakers."). All nine Justices in *Bartnicki* seemed to take seriously, however, the competing "constitutional values" the case raised. *See Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001) ("[T]hese cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."); *id.* at 536 (Breyer, J., concurring) ("[These statutes] help to protect personal privacy—an interest here that

III. THE *DAILY MAIL* CASES

Beginning in 1975, the Supreme Court decided a series of cases addressing the validity of government restrictions on the publication of truthful information. Two significant commonalities emerge: (1) Each case treated non-speech state interests of significant (one would almost say undeniable) legitimacy;⁴⁵ and (2) in each case the Court emphasized, explicitly or implicitly, the civic virtues of robust First Amendment protection.⁴⁶ The following localized tour through the Supreme Court's First Amendment precedents highlights these commonalities with an eye toward the Court's recent decision in *Bartnicki v. Vopper*.⁴⁷ Although in each case the Supreme Court went some length to emphasize that it was engaged in "a . . . delicate calculus that carefully weighs the conflicting interests,"⁴⁸ it is evident that the result of one case weighed heavily in the balance of subsequent cases.⁴⁹ The cumulative weight of the *Daily Mail* Cases establishes a strong presumption

includes not only the right to be let alone, but also the interest in fostering private speech.") (internal quotations omitted) (citations omitted); *id.* at 547 (Rehnquist, C.J., dissenting) ("[These statutes] allow private conversations to transpire without inhibition."). The Justices reached these conclusions despite the fact that the media defendants, and not the government, were the entities arguably deterring private speech.

⁴⁵ See, e.g., *Fla. Star v. B.J.F.*, 491 U.S. 524, 549 (1989) (White, J., dissenting) ("Simply put: Florida wanted to prevent the widespread distribution of rape victims' names.").

⁴⁶ In an article written just prior to the Supreme Court's decision in *Cox Broadcasting*, Professor Bloustein identified (approvingly) the beginnings of this allegiance to the democratic theory. See Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 95 (1974) ("Free expression is beginning to be seen to serve a profound political purpose, the assurance of the informed consent necessary to a democratic people.").

⁴⁷ 532 U.S. 514 (2001).

⁴⁸ *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 106 (1979) (Rehnquist, J., concurring). Then Justice Rehnquist's articulation of the balancing test in *Daily Mail* is a harbinger of his disagreement with the majority opinion in *Bartnicki* and perhaps an early realization that *Cox Broadcasting*, *Landmark*, and *Daily Mail* had established an unstoppable precedential momentum.

⁴⁹ The "influence" contemplated here is, of course, different from the ordinary *stare decisis* effect of prior decisions. The distinction is highlighted in the Third Circuit's *Bartnicki* decision, where the majority followed *Daily Mail* in eschewing categorical rules, but nonetheless recognized a trend in those cases. See *Bartnicki v. Vopper*, 200 F.3d 109, 117 (3d Cir. 1999) ("In keeping with the Supreme Court's approach to deciding these illustrative cases, we will resolve the present controversy not by mechanically applying a test gleaned from *Cox* and its progeny . . ."); *id.* at 128 ("It would be difficult to hold that privacy of telephone conversations are more 'important' than the privacy interests the states unsuccessfully championed in [the *Daily Mail*] cases."); see also *infra* Part III.A (discussing *Cox Broadcasting*).

against non-speech privacy values when protection of those values entails restrictions upon the media.⁵⁰

A. Cox Broadcasting Corp. v. Cohn

In *Cox Broadcasting* the Court considered the constitutionality of a Georgia statute that made it a misdemeanor to publish or broadcast the “name or identity” of a rape victim.⁵¹ Appellee’s seventeen-year-old daughter was raped and murdered. A reporter working for a television station owned by appellant Cox Broadcasting Corp. obtained the victim’s name from the indictments made available for his inspection in the courtroom.⁵² The victim’s name was broadcast later that day.⁵³ The decedent’s father sued the media defendants, relying on the Georgia statute. The Georgia Supreme Court held that the statute was “a legitimate limitation on the right of freedom of expression contained in the First Amendment.”⁵⁴ The Supreme Court reversed.⁵⁵

⁵⁰ As Professor Edelman sardonically notes, “The Justices comprising the majority [in *Florida Star v. B.J.F.*] expose themselves as absolutists in balancers’ clothing.” Peter B. Edelman, *Free Press and Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1223 (1990); see also *Fla. Star*, 491 U.S. at 550 (White, J., dissenting):

By holding that only “a state interest of the highest order” permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim’s right to privacy is not among those state interests of the highest order, the Court accepts appellant’s invitation . . . to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts.

⁵¹ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471–72 (1975). The statute provided, in pertinent part:

“It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be . . . disseminated in any newspaper, magazine, periodical or other publication published in this State or through any . . . broadcast originating in this State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made.”

Id. at 472 n.1 (quoting GA. CODE ANN. § 26-9901 (1972)).

⁵² *Id.* at 472–73; cf. *Fla. Star*, 491 U.S. at 527 (1989) (noting “reporter-trainee” obtained name of rape victim from police report).

⁵³ *Cox Broad.*, 420 U.S. at 472–73; see Lyrissa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 181 (1998) (“The competitive nature of the media marketplace is insidious because it puts those media organizations attempting to exercise restraint at a competitive disadvantage, rendering their efforts at restraint meaningless.”).

⁵⁴ *Cox Broad. Corp. v. Cohn*, 200 S.E.2d 127, 134 (Ga. 1973).

⁵⁵ *Cox Broad.*, 420 U.S. at 476. The Court reached the merits of the case only after an extensive treatment of jurisdictional issues. See *id.* at 476–87. The first step on the road to

The Court began its discussion of the merits of the case by acknowledging the existence and legitimacy of the privacy interest advanced by the plaintiff: “[T]here is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.”⁵⁶ Moreover, the Court identified a trend “running in favor of the so-called right of privacy.”⁵⁷ Here, however, this trend “direct[ly] confront[ed]”⁵⁸ the First Amendment.

The Court refused to categorically exempt from liability the publication of truthful information.⁵⁹ Although not unlimited, the press must be afforded wide

Bartnicki was nearly not taken. See generally Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 HARV. L. REV. 1004 (1978).

⁵⁶ *Cox Broad.*, 420 U.S. at 487; see also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.”). The evanescent quality of Justice Douglas’ opinion in *Griswold* has been the subject of much comment and criticism. See, e.g., Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1113 (2002) (“Justice Douglas’s opinion for the Court reads more like an amateur exercise in metaphysical poetry than law.”). State courts may have recourse to the more explicit provisions of their state constitutions, which may, or may not, secure greater privacy rights for their citizens than are granted by the federal Constitution. See, e.g., *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975) (recognizing right of privacy in home under explicit privacy clause in Alaska Constitution, protects “possession of marijuana by adults at home for personal use”).

⁵⁷ *Cox Broad.*, 420 U.S. at 488.

⁵⁸ *Id.* at 489.

⁵⁹ The Court noted:

[I]t is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.

Id. at 491. The “public records” component of the issue as framed by the Supreme Court in *Cox Broadcasting* arises again in *Florida Star* and in *Bartnicki* as a way of distinguishing *Cox Broadcasting*. See *Bartnicki v. Vopper*, 532 U.S. 514, 546 (2001) (Rehnquist, C.J., dissenting) (“This factor has no relevance in the present cases, where we deal with private conversations that have been intentionally kept out of the public domain.”); *Fla. Star v. B.J.F.*, 491 U.S. 524, 549 (1989) (White, J., dissenting) (distinguishing *Cox Broadcasting* because Florida’s public records statute, unlike Georgia’s, exempted rape victims’ names from disclosure and forbade officials to otherwise release such information). However, the significance of this factor was watered down by subsequent cases, and neither the majority nor concurring opinions felt obliged to consider the distinction. See *Smith v. Daily Mail Publ’g*, 443 U.S. 97, 98 (1979) (name of juvenile accused of murder obtained from interviewing witnesses); cf. *Bartnicki*, 532 U.S. at 546 n.3 (Rehnquist, C.J., dissenting) (attempting to distinguish *Daily Mail* on ground that statute imposed a “blanket prohibition” on publication, whereas statutes at issue in *Bartnicki* distinguish information obtained from legal sources from information deriving from illegal sources).

latitude to perform its salutary societal role as the government's watchdog.⁶⁰ Monitoring judicial proceedings falls within the ambit of that "[g]reat responsibility."⁶¹ Citizens rely upon the press to provide convenient access to government and information with which to vote intelligently.⁶² With regard to the judiciary in particular, "the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."⁶³ Moreover, the right of privacy as developed at common law recognized an exception for matters already public, and the name of the rape victim already appeared in official court records.⁶⁴ The risk of "timidity and self-censorship"⁶⁵ was too great to permit the state to sanction media outlets for publishing truthful information already available to the public in official court records.

⁶⁰ *Cox Broad.*, 420 U.S. at 491–92; see also Dilts, *supra* note 31, at 27 (noting First Amendment values independent of expression, including "the First Amendment value of political participation reflected in the so-called 'watchdog' role of the press"). All nine Justices in *Bartnicki* seemed to acknowledge, at least implicitly, that the First Amendment can also be in tension with expression. See *Bartnicki*, 532 U.S. at 518 ("[T]hese cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."); *id.* at 536 (Breyer, J., concurring) ("[These statutes] help to protect personal privacy—an interest here that includes not only the right to be let alone, but also the interest in fostering private speech.") (internal quotations omitted) (citations omitted); *id.* at 547 (Rehnquist, C.J., dissenting) ("[These statutes] allow private conversations to transpire without inhibition."); see also *supra* notes 45–48 and accompanying text.

⁶¹ *Cox Broad.*, 420 U.S. at 491–92; see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.

Id. (internal quotations omitted) (internal citations omitted); see also Dilts, *supra* note 31, at 27 ("The First Amendment's Press Clause has been interpreted to include [the] right[] of access to judicial proceedings.").

⁶² *Cox Broad.*, 420 U.S. at 491–92; see also MEIKLEJOHN, *supra* note 31, at 26 (using model of town meeting to explore self-government: "The final aim of the meeting is the voting of wise decisions.").

⁶³ *Cox Broad.*, 420 U.S. at 492; see also LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) ("[S]unshine is said to be the best disinfectant.").

⁶⁴ *Cox Broad.*, 420 U.S. at 494–95.

⁶⁵ *Id.* at 496; see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . self-censorship.") (internal quotations omitted).

B. Landmark Communications, Inc. v. Virginia

In 1978, the Supreme Court addressed whether Virginia could criminally sanction publication of information pertaining to confidential proceedings before a judicial review commission.⁶⁶ Defendant Landmark Communications, Inc. published an article identifying a state judge then under investigation by the Virginia Judicial Inquiry and Review Commission.⁶⁷ Landmark was prosecuted and convicted.

The United States Supreme Court reversed.⁶⁸ The Court acknowledged three general interests served by the confidentiality requirements. First, witnesses are encouraged to come forward without fear of recrimination.⁶⁹ This advances the Commission's interest in bringing to light judicial misconduct. Second, and most relevant as a harbinger of the Court's decision in *Bartnicki*, it protects judges from the injury caused by publication of allegations that turn out to be frivolous or unwarranted.⁷⁰ Finally, the legitimacy of the judiciary is damaged by the publication of claims that are eventually established to be frivolous.⁷¹

⁶⁶ *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 830 n.1 (1978). Evincing the state's conviction on this issue, confidentiality was secured by the state constitution, by statute and by the rules of the judicial review commission. *Id.* See generally David Cleveland & Jason Masimore, *The Ermine and Woolsack: Disciplinary Proceedings Involving Judges, Attorney-Magistrates, and Other Judicial Figures*, 14 GEO. J. LEGAL ETHICS 1037 (2001); Alan B. Rabkin, *Is There a Public Interest in Knowing More or Less About Unproven Claims of Judicial Misconduct?*, 9 NEV. LAW. 20 (2001); Mary Ellen Keith, *Judicial Discipline: Drawing the Line Between Confidentiality and Public Information*, 41 S. TEX. L. REV. 1399 (2000).

⁶⁷ *Landmark*, 435 U.S. at 831.

⁶⁸ At that time, forty-seven states and the District of Columbia had established a confidentiality requirement for judicial disciplinary proceedings. *Landmark*, 435 U.S. at 834; cf. Keith, *supra* note 66, at 1402 ("Most states . . . maintain the confidentiality of the investigatory phase of a proceeding, and make public the matter only after some level of probable cause findings.").

⁶⁹ *Landmark*, 435 U.S. at 835.

⁷⁰ *Id.* at 835; see also SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 465 (2d ed. 1995) ("Proponents of confidentiality point out that seventy-five percent of the complaints brought to commissions are determined to be unfounded, frivolous, or lacking proper jurisdiction."). The intensely competitive marketplace for news can compound the problem. See *Rushford v. Civiletti*, 485 F. Supp. 477, 479 (D.D.C. 1980) ("Exoneration rarely commands the same public attention as a charge of wrongdoing.").

⁷¹ *Landmark*, 435 U.S. at 835; see also SHAMAN ET AL., *supra* note 70, at 466 (arguing that the problem with justifying confidentiality on the basis of the high percentage of frivolous claims is that "it presumes that the public should be allowed access only to 'demonstrated truths,' a presumption particularly unwarranted in matters concerning the government") (quoting *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 579 F. Supp. 192 (E.D. Pa. 1984), *vacated and remanded*, 784 F.2d 467 (3d Cir. 1986)).

The Court assumed the legitimacy of these general interests, but went to great pains to define the countervailing interest in the narrowest way possible.⁷² Hewing close to this “narrow and limited” question, the Court expressly did not hold that reporting truthful information concerning matters of public importance is *always* immune from criminal sanction.⁷³ Nevertheless, the Court described the publication of truthful information concerning matters of public importance as “near the core of the First Amendment.”⁷⁴ A major purpose of the First Amendment is “to protect the free discussion of governmental affairs.”⁷⁵ The activity of the judiciary, no less than that of other branches of government, is a “matter[] of utmost public concern.”⁷⁶

⁷² *Landmark*, 435 U.S. at 837. The Court wondered

whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission. We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it. We do not have before us any constitutional challenge to a State’s power to keep the Commission’s proceedings confidential or to punish participants for breach of this mandate. Nor does *Landmark* argue for any constitutionally compelled right of access for the press to those proceedings. Finally . . . the challenged statute does not constitute a prior restraint or attempt by the State to censor the news media.

Id. (citations omitted).

⁷³ *Id.* at 838. *Landmark* reasoned that because untruthful speech about public officials is protected, *id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)), it followed that truthful speech warrants complete protection.

⁷⁴ *Landmark*, 435 U.S. at 838.

⁷⁵ *Id.* at 838. In the same sentence the Court acknowledges, albeit backhandedly, that other theories exist: “*Whatever differences may exist* about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Id.* (emphasis added); *cf. TRIBE*, *supra* note 28, at 788 (“Those who defend freedom of speech as an end in itself . . . at times err . . . by forgetting that freedom of speech is also central to the workings of a tolerably responsive and responsible democracy . . .”). The Court is less circumspect elsewhere in the opinion. *See Landmark*, 435 U.S. at 839. By reporting about the inquiry, defendant “clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.” *Id.*

⁷⁶ *Landmark*, 435 U.S. at 839. The Court went on to note:

A responsible press has always been regarded as the handmaiden of effective judicial administration Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Id. (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)). Consider in this connection the speculation that the right of privacy owes its origins to the overzealous “handmaiden” at whose hands the right is continually defeated (*Shepard* being a prime example):

C. Smith v. Daily Mail Publishing Co.

In *Daily Mail*, the Supreme Court considered whether a West Virginia statute violated the First and Fourteenth Amendments by making it a crime for a newspaper to publish, without approval from the juvenile court, the name of a youth charged as a juvenile offender.⁷⁷ In a fact pattern that would become all too familiar a generation later, a fifteen-year-old student was shot and killed at school by a fellow student.⁷⁸ Two local newspapers became aware of the shooting by

The social need which became crystallized in the right of privacy did not grow insistent until the age of great industrial expansion, when miraculous advances in transportation and communication threatened to annihilate time and space, when the press was going through the growing pains of "yellow journalism," when Business first became Big.

Louis Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941); see also, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890):

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.

⁷⁷ *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 98 (1979). Violation of the statute was a misdemeanor punishable by a fine of between \$10 and \$100 or a jail sentence of between five days and six months, or both a fine and jail time. *Id.* at 99. Two years earlier the Supreme Court had decided a case featuring aspects of both *Landmark* (information in government's control) and *Daily Mail* (protecting privacy of juveniles accused of crimes). See *Okla. Publ'g Co. v. Dist. Court ex rel. Okla. County*, 430 U.S. 308 (1977) (per curiam). In that case, the name and photograph of an eleven-year-old boy accused of second-degree murder were obtained by members of the press at a detention hearing that was open to the public. *Id.* at 309. The boy's identity had already been revealed in press reports when the judge, during a closed arraignment hearing, enjoined publication of the boy's name and photograph. *Id.* The Supreme Court struck down the order pursuant to the principle articulated in *Cox Broadcasting*: "The name and picture of the juvenile here were publicly revealed in connection with the prosecution of the crime . . . much as the name of the rape victim in *Cox Broadcasting* was placed in the public domain." *Id.* at 311 (internal quotations omitted) (internal citations omitted).

⁷⁸ *Daily Mail*, 443 U.S. at 99. See generally, DENISE M. BONILLA, *SCHOOL VIOLENCE* (2000). For a discussion of the privacy interests implicated in the wake of school violence incidents, see Michael Weatherstone, *Mandatory Mental Evaluations: Should We Psychologically Profile the Students in Our Schools?*, 24 RUTGERS L. REC. 4 (2000), and Ronald Susswein, *The New Jersey School Search Policy Manual: Striking the Balance of Students' Rights of Privacy and Security After the Columbine Tragedy*, 34 NEW ENG. L. REV. 527 (2000). The responses to the tragedy at Columbine are instructive in light of recent events. Compare Gerard Baker, *A Rich Country Catches a Glimpse of Its Dark Side in High School Shootings: Freedom from Want Has Not Brought Freedom from Fear*, FIN. TIMES (London), Apr. 22, 1999, at 5 ("[P]olls suggest people feel less safe than ever . . ."), with Gigi Anders, *Losing Sleep over 9-11: Newfound Night Terrors Reflect Our Uncertain Mind-Set*, WASH.

routine monitoring of the police band radio frequency, and reporters sent to the scene obtained the name of the assailant by interviewing witnesses.⁷⁹ One of the two papers initially omitted the name of the juvenile to avoid liability under the state statute, but changed its mind after competing newspapers (and several radio stations) went ahead with publication.⁸⁰ The West Virginia Supreme Court of Appeals held that the indictment was an unconstitutional prior restraint, and the Supreme Court affirmed.

Petitioners in *Daily Mail* faced the ostensibly greater burden imposed on prior restraints, which must overcome a "heavy presumption against . . . constitutional validity."⁸¹ The Supreme Court instead decided the case on the "constitutional standards defined in *Landmark*."⁸² However, the characterization of the case as a prior restraint or ex post criminal sanction is not dispositive:

POST, Dec. 11, 2001, at C10 ("There's a changed context in the environment that feels less safe to us . . . and it'll be an extended time before we can feel safe again.").

⁷⁹ *Daily Mail*, 443 U.S. at 99; see also Kent R. Middleton, *Radio Privacy Under Section 705(A): An Unconstitutional Oxymoron*, 9 ADMIN. L.J. AM. U. 583, 583 (1995) (maintaining that section 705(a) of the Federal Communications Act, which "prohibits the unauthorized interception and divulgence of public service radio transmissions that are not intended for the general public," violates the First Amendment pursuant to principles articulated in *Daily Mail* line of cases). Perhaps the best case for permitting this method of newsgathering is its potential to reveal and possibly prevent police misconduct. See *id.* at 584–85 (recording of police radio transmissions casted doubt on assertion by law enforcement officials that beating of Rodney King was in "self-defense"); cf. Smolla, *supra* note 10, at 1099 (noting perception that "media and law enforcement are often in cahoots"). However, there is an obvious distinction between monitoring police band frequencies, which can be characterized as forums where the government conducts its business (like the courtrooms in *Landmark* and *Oklahoma Publishing*), and monitoring frequencies used by private individuals. Certainly with respect to the former, the press' watchdog function is implicated. Cf. *infra* Part V.B (arguing that interests of the press and the individual citizen cannot be wholly aligned even when both are threatened by an overweening government).

⁸⁰ *Daily Mail*, 443 U.S. at 99–100. Compare *Fla. Star v. B.J.F.*, 491 U.S. 524, 547 n.2 (1989) (White, J., dissenting) ("The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter."), with Smolla, *supra* note 10, at 1129 ("It may offend good taste or even elemental norms of human sensitivity and decency to film a person dying on the street after a shooting or fire, but the images are certainly newsworthy, and the decision to disseminate them should be left to the ethical judgment of journalists."). These contrasting sensitivities bear out Professor Raymond Wacks' observation: "Opponents of legal, or even non-legal, checks on unwanted public disclosure like to depict concern for the victim as quaint, even prudish. This is contrasted with the aggressively robust pursuit of the truth by the press." RAYMOND WACKS, *LAW, MORALITY & THE PRIVATE DOMAIN* 309 (2000).

⁸¹ *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotations omitted) (citation omitted).

⁸² *Daily Mail*, 443 U.S. at 102.

“[E]ven the latter action requires the highest form of state interest to sustain its validity.”⁸³

Once again, the Court declined to establish a categorical rule.⁸⁴ And again, the state was able to articulate legitimate, non-speech values served by the criminal sanctions. Publicity negatively impacts the rehabilitation of the juvenile offender.⁸⁵ Moreover, publication stigmatizes the juvenile as a criminal in ways that are not offset by state expungement laws.⁸⁶ The juvenile’s “record” remains

⁸³ *Id.* Compare Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989) (“Since the 1931 release of the Supreme Court’s opinion in *Near v. Minnesota*, the doctrine of prior restraint has been an essential element of first amendment jurisprudence.”), with John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 437 (1983) (arguing to abandon the doctrine). Whatever impact the doctrine may have in other areas of the law, it is unlikely to play a role in future decisions in this area. *Cf.* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 187–89 (1998) (arguing that prior restraints doctrine should apply to cases of copyright infringement).

⁸⁴ *See Daily Mail*, 443 U.S. at 105–06.

Our holding in this case is narrow. There is no issue before us of unlawful press access to confidential judicial proceedings . . . there is no issue here of privacy or prejudicial pretrial publicity. At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent’s name lawfully obtained by a newspaper.

Id.

⁸⁵ *Id.* at 107–08 (Rehnquist, J., concurring). A rich literature has developed around the concept of “shaming” and its role in punishing criminal offenders. *See, e.g.*, JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (1989); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL’Y & L. 645 (1997). Leaving to one side its appropriateness as a rehabilitative device, the doctrine is instructive of the effects of publicity on individuals. Compare Kahan & Posner, *supra*, at 370 (“When their crime is widely publicized in a manner that excites revulsion, people will refuse to deal with them. They will not hire them or socialize with them.”), with Dan Markel, *Are Shaming Punishments Beautifully Retributive?: Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2174 n.84 (2001).

What Kahan and Posner overlook is that if they are correct, and if the reputation of an offender is completely destroyed by the measures they endorse, the punishment of the offenders never ends, thus vitiating an important possibility that an offender can be punished and then “move on” in some manner productive to society.

Id. Although part of the effects of shaming are attributable to society’s reaction to the underlying crime, the same reaction might be elicited by exposing non-criminal, but still socially discouraged, private behavior. *Cf.* Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117 (2001) (advocating public censure for members of the media in order to reintegrate the victims of privacy invasion back into society).

⁸⁶ *Daily Mail*, 443 U.S. at 108 (Rehnquist, J., concurring).

available for future employers in the archives of the newspaper that originally published the juvenile's name.

Despite the legitimacy of these interests, the Court held that protecting the identity of alleged juvenile offenders was of insufficient "magnitude" to outweigh the respondent's interests in publishing truthful information.⁸⁷ The Court relied upon its decision in *Davis v. Alaska*⁸⁸ where it dealt with a state law that prevented criminal defendants from impeaching prosecution witnesses on the basis of their juvenile records. In that case, the state's interest in encouraging rehabilitation by "burying" juvenile offenses was subordinate to the defendant's Sixth Amendment right of confrontation.⁸⁹ Because "[t]he important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment," the balance struck by *Davis* "carries over" to *Daily Mail*.⁹⁰

The "important rights" the Court had in mind clearly were those exercised by the press in performing its "Fourth Estate" function. Interestingly, then Justice Rehnquist's concurring opinion invokes the democratic rhetoric most explicitly, but in the context of questioning the primacy of free speech over privacy: "Historically, we have viewed freedom of speech and of the press as indispensable to a free society and its government. But recognition of this proposition has not meant that the public interest in free speech and press always has prevailed over competing interests of the public."⁹¹

D. *Florida Star v. B.J.F.*

Before *Bartnicki*, *Florida Star v. B.J.F.*⁹² represented the Supreme Court's last word in the "truthful information" line of decisions. In *Florida Star*, the Court examined the constitutional validity of a state statute making it unlawful to

⁸⁷ *Id.* at 104.

⁸⁸ 415 U.S. 308 (1974).

⁸⁹ *Id.* at 319.

⁹⁰ *Daily Mail*, 443 U.S. at 104. Then Justice Rehnquist pointed out in his concurring opinion that the outcome of a balancing process in one case should not have "reciprocity" in another case if the process is to be truly particularized. *Id.* at 109 n.2. In reality, this is probably an accurate representation of the process by which State interests repeatedly fail to exceed in importance their forerunners in prior cases. See *Fla. Star v. B.J.F.*, 491 U.S. 524, 550 (1989) (White, J., dissenting):

By holding that only "a state interest of the highest order" permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation . . . to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts.

⁹¹ See *Daily Mail*, 443 U.S. at 106 (Rehnquist, J., concurring).

⁹² 491 U.S. 524 (1989).

publish the name of a victim of sexual abuse.⁹³ The victim, "B.J.F.," had been robbed and sexually assaulted.⁹⁴ The defendant-newspaper obtained its information concerning the crime and the victim's name from a police report and subsequently published the victim's full name in contravention of the statute and its own internal policy.⁹⁵ The victim prevailed in the lower courts, but the Supreme Court reversed.

Although the victim's claim in *Florida Star* was very similar to the claim brought in *Cox Broadcasting*, that case was not controlling because the victim's name was not obtained from "public records."⁹⁶ Nor was the Court willing to reconsider its determination to eschew categorical rules.⁹⁷ Instead, the Court applied what it called "the *Daily Mail* principle": (a) whether the newspaper lawfully obtained truthful information about a matter of public significance;⁹⁸ (b) whether imposing liability serves "a need to further a state interest of the highest order."⁹⁹ The Court held that the commission and investigation of a crime *is* a matter of public importance, even if the identity of the individual victim is not.¹⁰⁰

The Court held there was insufficient "need" to sanction media outlets to serve the State's "highly significant interest[]" in protecting the privacy and safety of victims of sexual assault.¹⁰¹ The Police Department was partially to blame for

⁹³ *Id.* at 526. The statute provided, in pertinent part:

"Unlawful to publish or broadcast information identifying sexual offense victim.—No person shall print, publish, or broadcast, or cause or allow to be printed, published or broadcast, in any instrument of mass communication, the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense . . . shall constitute a misdemeanor . . ."

Id. at 526 n.1 (quoting FLA. STAT. ANN. § 794.03 (West 1987)).

⁹⁴ *Id.* at 527.

⁹⁵ *Id.* at 527–28.

⁹⁶ *Id.* at 532; *see also* *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). The Court reasoned:

By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Id.

⁹⁷ *Fla. Star*, 491 U.S. at 532–33. The Court recognized, at least implicitly, the momentum of its previous decisions in this area when it noted that "although our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context." *Id.* at 530.

⁹⁸ *Id.* at 533.

⁹⁹ *Id.* at 537.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 537.

the subsequent dissemination of the victim's name by revealing her name in the police report in the first place.¹⁰² The statute's strict liability standard swept too broadly: The victim's name might already be a matter of public knowledge.¹⁰³ The statute was also too narrow because individuals (as opposed to media outlets) who "spread[] word of the identity of a rape victim" are not covered.¹⁰⁴ Given these infirmities, the statute could not withstand the strict scrutiny mandated by *Daily Mail*.

The appropriateness of the *Daily Mail Cases* in this context depended, in part, on "the overarching 'public interest, secured by the Constitution, in the dissemination of truth.'" ¹⁰⁵ The public significance of the victim's name inhered in the public's interest in "the commission, and investigation, of a violent crime which had been reported to authorities."¹⁰⁶ This is an implicit importation of the constitutional exegesis performed in the *Cox Broadcasting* decision.¹⁰⁷ The Court was saying, in essence, that it is as fundamental to self-governance to monitor the investigation of crime as it is to monitor its adjudication.¹⁰⁸

E. Conclusion

The line of cases from *Cox Broadcasting* to *Florida Star* evince the Supreme Court's steadfast reliance upon the collectivist theories of the First Amendment. The privacy of the individual citizen must give way to the interest of the press in serving/creating an informed citizenry. On the other hand, the Court may have lacked the opportunity to articulate any other First Amendment theory. In each of the foregoing cases the state articulated non-speech-based justifications for its statutes. It would not have made sense for the Court to characterize the countervailing interest of the media defendants in terms of "autonomy" or "self-realization." Moreover, the Court's commitment to particularized determination assured, at least ostensibly, that the Court would be receptive to other First

¹⁰² *Id.* at 538; see also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) ("[M]uch of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings.")

¹⁰³ *Fla. Star*, 491 U.S. at 539; see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494 (1975) (stating tort for public disclosure of private facts recognized exceptions for matters already public).

¹⁰⁴ *Fla. Star*, 491 U.S. at 540.

¹⁰⁵ *Id.* at 533–34 (quoting *Cox Broad.*, 420 U.S. at 491). There are shades of the marketplace theory here, in addition to the democratic theory relied upon in *Cox*.

¹⁰⁶ *Id.* at 536–37.

¹⁰⁷ The rape victim's name was "'a matter of public significance' in the sense in which the *Daily Mail* synthesis of prior cases used that term." *Id.* at 536. Those cases included *Cox Broadcasting* and *Landmark*. See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 101 (1979).

¹⁰⁸ See *supra* Parts III.A., III.B.

Amendment values in the appropriate case. Any *threat* to First Amendment values inherent in these decisions seemed, therefore, speculative before *Bartnicki*.

III. *BARTNICKI V. VOPPER: DAILY MAIL MEETS PRIVATE SPEECH*

A. Background

In 1992, the Wyoming Valley West School District was engaged in protracted negotiations with the Wyoming Valley West School District Teachers' Union over the terms of the teachers' new contract.¹⁰⁹ During the negotiations between the teachers' union and the school board, a citizens group, Wyoming Valley West Taxpayers Association, was created to oppose the union's proposals.¹¹⁰ Jack Yocum was president of the Association.¹¹¹ The negotiations were "markedly contentious, generated significant public interest and were frequently covered by the news media."¹¹² Gloria Bartnicki was employed by the Pennsylvania State Education Association ("PSEA") and served as a negotiator in the contract dispute.¹¹³ A teacher at Wyoming Valley West High School, Anthony Kane, Jr., was president of the PSEA's local union.¹¹⁴ All three, Yocum, Bartnicki, and Kane, were "heavily involved in the negotiating process."¹¹⁵

In May of 1993, over a year into the negotiations, Bartnicki telephoned Kane using her cellular phone.¹¹⁶ The conversation, which concerned whether the teachers would obtain the three-percent raise proposed by the school board or the six-percent raise proposed by the teachers' union,¹¹⁷ was less remarkable for its content than for its tone. Kane stated that "we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys."¹¹⁸ Unbeknownst to either party, a third party intercepted the phone conversation.¹¹⁹

¹⁰⁹ *Bartnicki v. Vopper*, 200 F.3d 109, 112–13 (3d Cir. 1999).

¹¹⁰ *Bartnicki v. Vopper*, No. 3:CV-94-1201, 1996 U.S. Dist. LEXIS 22517, at *2 (M.D. Pa. June 14, 1996).

¹¹¹ *Id.* at *3.

¹¹² *Bartnicki*, 200 F.3d at 113.

¹¹³ *Bartnicki*, 1996 U.S. Dist. LEXIS 22517, at *2.

¹¹⁴ *Id.*

¹¹⁵ *Bartnicki*, 200 F.3d at 113.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* The pertinent part of the conversation is as follows:

[Kane:] If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on those guys . . . Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three

Later that year, the parties accepted a non-binding arbitration proposal that "was generally favorable to the teachers."¹²⁰ As media reports of the settlement disseminated, Frederick Vopper, "a radio commentator who had been critical of the union in the past, played a tape of the intercepted conversation on his public affairs talk show."¹²¹ Other media outlets also picked up the story.¹²² It was later discovered that Vopper had obtained the tape from Jack Yocum.¹²³ Yocum, in turn, had received the tape anonymously in his mailbox.¹²⁴ Bartnicki and Kane brought suit against Vopper and various media representatives for violations of Title III of the Omnibus Crime Control and Safe Street Act of 1968¹²⁵ and the Pennsylvania Wiretapping and Electronic Surveillance Control Act.¹²⁶

The District Court, after denying the media defendants' motion for summary judgment on the First Amendment issue,¹²⁷ granted a motion for interlocutory

percent. What they should have said, 'we'll [sic] meet and discuss this.' You don't discuss the items in public.

....

[Bartnicki:] No.

....

[Kane:] You don't discuss this in public. . . . Particularly with the press.

Id.

¹¹⁹ *Id.* None of the parties in the lawsuit that arose subsequent to these events could supply facts regarding the interception: the method employed and the identity of the interceptor remain a mystery. See *Bartnicki*, 1996 U.S. Dist. LEXIS 22517, at *3 n.1.

¹²⁰ *Bartnicki v. Vopper*, 532 U.S. 514, 519 (2001).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Bartnicki*, 200 F.3d at 113.

¹²⁵ 18 U.S.C. § 2511. Under the Act, actual damages, or "statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000" may be recovered. 18 U.S.C. § 2520(c)(2) (2000).

¹²⁶ 18 PA. CON. STAT. ANN. § 5701 (1999). Under the Pennsylvania Act, the plaintiff may recover punitive damages and reasonable attorney's fees in addition to the greater of \$100 a day or \$1000. 18 PA. CON. STAT. ANN. § 5725(a) (1999).

¹²⁷ *Bartnicki*, 1996 U.S. Dist. LEXIS 22517, at *12. Defendants' First Amendment claim was rejected on the ground that the statutes at issue were of "general application," thereby removing the issue from the scope of the Supreme Court's *Daily Mail* line of precedent. *Id.* at *11. The District Court relied, instead, on *Cohen v. Cowles Media Co.* for the proposition that laws of general applicability "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)). In *Cohen*, a publisher was fined under a promissory estoppel theory for publishing the identity of a confidential informant. *Cohen*, 501 U.S. at 672. The doctrine of promissory estoppel, like the Federal Wiretapping Act (and its state analog), "do[es] not . . . target or single out the press." *Bartnicki*, 1996 U.S. Dist. LEXIS 22517, at *12. On that ground, and without further analysis, the District Court denied Defendants' motion for summary judgment on the First Amendment issue. *Id.*

appeal, certifying as controlling questions of law whether the imposition of liability against the media defendants and Jack Yocum, respectively, violated the First Amendment.¹²⁸

The Third Circuit reversed, although it agreed with the lower court that the *Daily Mail* line of cases was not controlling.¹²⁹ Nevertheless, the court noted that the legitimacy of the privacy interests in *Cox Broadcasting*,¹³⁰ *Landmark*,¹³¹ and *Daily Mail*,¹³² was unassailable. If these interests, when weighed in the Supreme Court's balance, were less significant than countervailing First Amendment principles, "[i]t would be difficult to hold that privacy of telephone conversations are more 'important' than the privacy interests the states unsuccessfully championed in those cases."¹³³ The Supreme Court granted certiorari after the Fifth Circuit reached the opposite conclusion.¹³⁴

B. Bartnicki v. Vopper

1. Majority Opinion

The Supreme Court endeavored, in the now familiar mode, to narrowly frame the issue: "The constitutional question before us concerns the validity of the statutes as applied to the specific facts of these cases."¹³⁵ The Court agreed that the federal and state statutes were "content-neutral law[s] of general

¹²⁸ *Bartnicki*, 200 F.3d at 113–14. The United States intervened to defend the constitutionality of the federal statute. *Id.* at 114.

¹²⁹ *Id.* at 116; see also *supra* note 127 and accompanying text.

¹³⁰ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 472 (1975) (discussing the name or identity of a rape victim).

¹³¹ *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 830 (1978) (discussing the identity of judge subject to judicial disciplinary proceedings).

¹³² *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 98 (1979) (discussing the name of youth charged as a juvenile offender).

¹³³ *Bartnicki*, 200 F.3d at 128.

¹³⁴ In *Peavy v. WFAA-TV, Inc.*, the Fifth Circuit held that applying the Federal and Texas Wiretap Acts to a television station and its reporter does not violate the First Amendment when the media defendants were involved in the interception of plaintiffs' cordless telephone conversations. 221 F.3d 158, 163, 194 (5th Cir. 2000); see also *infra* Part IV.A.2.

¹³⁵ *Bartnicki v. Vopper*, 532 U.S. 514, 524 (2001). The Court noted:

"We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case"
Accordingly, we consider whether, given the facts of these cases, the interests served by § 2511(1)(c) can justify its restrictions on speech.

Id. at 529 (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 532–33 (1989); see also *id.* at 535 (Breyer, J., concurring) ("I join the Court's opinion. I agree with its narrow holding limited to the special circumstances presented here. . . ."))

applicability.”¹³⁶ However, the statute’s proscription of “disclosure” was “fairly characterized as a regulation of pure speech.”¹³⁷

The Court quoted *Daily Mail* for the proposition that “state action to punish the publication of truthful information seldom can satisfy constitutional standards.”¹³⁸ Truthful information regarding “matter[s] of public significance,” if lawfully obtained, is afforded protection “absent a need . . . of the highest order.”¹³⁹ The issue was refined still further through the lenses of *Florida Star* and *New York Times*.¹⁴⁰ The Court noted that in *New York Times*, although the information subjected to prior restraint had been stolen, “neither the majority nor the dissenters placed any weight on that fact.”¹⁴¹ Likewise, the *Florida Star* court left the legality issue unresolved.¹⁴² Justice Stevens characterized the issue in *Bartnicki* as a “narrower version of that still-open question,” whether the government may punish the lawful acquisition and subsequent disclosure of unlawfully obtained information.¹⁴³

The government argued that by punishing the publisher, the market for intercepted information would dry up, thereby eliminating the incentive to

¹³⁶ *Id.* at 526. Looking to the purpose of the statute, to “protect the privacy of wire, electronic, and oral communications,” it is apparent that the statute distinguishes communications based on the source (i.e., whether it is inadvertently or intentionally intercepted) rather than the content. S. REP. NO. 90-1097, at 66 (1968).

The Court also noted, however, that the determination was “not always a simple task.” *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642–43 (1994)). Compare *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002) (holding that park ordinance requiring permit before conducting more than fifty person events was content-neutral because “[n]one of the grounds for denying a permit has anything to do with what a speaker might say”), with *Freedman v. Maryland*, 380 U.S. 51, 52 n.2 (1965) (finding that content-based state statute predicated issuance of license to exhibit film on approval by Board of Censors for moral content).

¹³⁷ *Bartnicki*, 532 U.S. at 526. However, the Court noted that § 2511(1)(d), which prohibits the “use” of the contents of illegal interceptions, is a regulation of conduct. *Bartnicki*, 532 U.S. at 526. The Court quoted from the government’s brief detailing the range of conduct that is proscribed by (d). *See id.* at 527 n.10. For example, (d) prohibits the use of intercepted conversations for extortion or to engage in insider trading. *Cf. In re Grand Jury*, 111 F.3d 1066, 1077–79 (3d. Cir. 1997).

¹³⁸ *Bartnicki*, 532 U.S. at 527 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979)).

¹³⁹ *Id.* at 528 (alteration in original) (quoting *Daily Mail*, 443 U.S. at 103).

¹⁴⁰ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

¹⁴¹ *Bartnicki*, 532 U.S. at 528.

¹⁴² *Fla. Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989) (noting that the Court was not deciding “whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well”).

¹⁴³ *Cf. Bartnicki*, 532 U.S. at 548 (Rehnquist, C.J., dissenting) (characterizing the entire chain of distribution and dissemination as illegal).

intercept in the first instance.¹⁴⁴ The majority opinion characterized this approach as an unwarranted departure from the “normal method of deterring unlawful conduct.”¹⁴⁵ Although this deterrence argument has been accepted in certain of the Supreme Court’s free speech precedents,¹⁴⁶ and in other areas of criminal law,¹⁴⁷ it was insufficient to uphold the constitutionality of § 2511(c).¹⁴⁸ The Supreme Court emphasized the weak empirical foundation of the deterrence argument.¹⁴⁹ Moreover, in “virtually all” cases litigated under § 2511(1)(a) the identity of the interceptor has been known.¹⁵⁰ In other words, it has been the rare case where, as in *Bartnicki*, the interceptor cannot be sanctioned directly.¹⁵¹ Lacking empirical support, the government’s first argument was deemed “plainly insufficient.”¹⁵²

The government also argued the statute “minimiz[ed] the harm to persons whose conversations have been illegally intercepted.”¹⁵³ However, because the information at issue (the conversation) is truthful and of public concern, the “core purposes of the First Amendment” are implicated.¹⁵⁴ In such instances, “privacy

¹⁴⁴ *Bartnicki*, 532 U.S. at 529–30.

¹⁴⁵ *Id.* at 529.

¹⁴⁶ *See, e.g.*, *Osborne v. Ohio*, 495 U.S. 103 (1990) (holding Ohio law prohibiting the possession and viewing of child pornography constitutional); *New York v. Ferber*, 458 U.S. 747 (1982) (upholding New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of sixteen by distributing material which depicts such a performance). The Court distinguished *Ferber* and *Osborne* on the ground that the speech engaged in by the defendants was of “minimal value.” *Bartnicki*, 532 U.S. at 530 n.13.

¹⁴⁷ The majority rejected the relevance of mail theft and stolen property—crimes that proscribe the receipt or possession of an item “to deter some primary illegality”—because “[n]either of those examples . . . involve prohibitions on speech.” *Bartnicki*, 532 U.S. at 530 n.13.

¹⁴⁸ *Id.* at 530.

¹⁴⁹ *See id.* at 530–31 (“[T]here is no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions.”).

¹⁵⁰ *Id.* at 530.

¹⁵¹ The majority and dissent quibble over the correct number of such cases, the number being between 5 and 9 out of 206. *See id.* at 531 n.17.

¹⁵² *Id.* at 532.

¹⁵³ *Bartnicki*, 532 U.S. at 529.

¹⁵⁴ *Id.* at 533–34. The majority opinion contrasts the information at issue in this case with “disclosures of trade secrets or domestic gossip or other information of purely private concern.” *Id.* at 533. In this regard, the majority opinion is (at least ostensibly) more circumspect than the concurring opinion. The majority opinion cites *Time, Inc. v. Hill* for the proposition that the constitutional validity of proscribing publication of “information of purely private concern” has not been decided. *Id.* (citing *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967)). The concurring Justices agree that the conversation between *Bartnicki* and Kane is “far removed” from the publication of purely private matters, but is less guarded about the constitutionality of proscribing the latter. *Bartnicki*, 532 U.S. at 540. Together with the dissenting Justices, there

concerns give way when balanced against the interest in publishing matters of public importance.”¹⁵⁵

Consistent with the *Daily Mail* line of cases, the “core purposes” contemplated by the majority opinion are collectivist: “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”¹⁵⁶ The majority acknowledged the “chilling effect on private speech,”¹⁵⁷ but relied instead upon “our ‘profound commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.’ ”¹⁵⁸

2. *Concurring Opinion*

Justice Breyer, joined by Justice O’Connor, wrote separately to emphasize the narrowness of the majority’s holding,¹⁵⁹ and more importantly, to disapprove the use of strict scrutiny where “important competing constitutional interests are implicated.”¹⁶⁰ Justice Breyer would instead interject a measure of proportionality into the balancing process: Are the restrictions on speech disproportionate relative to the benefit to privacy?¹⁶¹ Applying this less-demanding test produced the same result, however. Because the media defendants did not unlawfully acquire the tape,¹⁶² and because the substance of the intercepted conversation related to a public controversy,¹⁶³ the statutes disproportionately interfered with media freedom to protect communications giving rise to “little or no *legitimate*” expectation of privacy.¹⁶⁴

The theory of First Amendment protection relied upon by the concurring Justices is difficult to assess. For the concurring Justices, the competing interests are “media freedom” and “personal, speech-related privacy.”¹⁶⁵ Media freedom is consistent with collectivist First Amendment theories, but is the countervailing interest, for the concurring Justices, a First Amendment interest? A privacy

appears, therefore, to be at least a weak majority for drawing the line at purely private matters. See *infra* Part IV.

¹⁵⁵ *Bartnicki*, 532 U.S. at 534.

¹⁵⁶ *Id.* at 534.

¹⁵⁷ *Id.* at 533.

¹⁵⁸ *Id.* at 534.

¹⁵⁹ *Id.* at 535.

¹⁶⁰ *Id.* at 536 (Breyer, J., concurring).

¹⁶¹ *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

¹⁶² *Id.* at 538 (Breyer, J., concurring).

¹⁶³ *Id.* at 539 (Breyer, J., concurring).

¹⁶⁴ *Id.* (Breyer, J., concurring).

¹⁶⁵ *Id.* at 538 (Breyer, J., concurring).

interest? A hybrid of privacy and First Amendment interests? Private speech is a hybrid in this sense, but the question is which line of precedent controls. As developed later in this note, the concurring Justices seem to favor more robust privacy protection with only incidental impact on private speech.¹⁶⁶

3. *Dissenting Opinion*

Chief Justice Rehnquist, writing for three Justices, dissented. The dissenting Justices would have applied intermediate scrutiny because the statutes were content-neutral.¹⁶⁷ The majority's reliance on the *Daily Mail* line of cases was an attempt to "avoid" the Court's precedents treating content-neutral laws more favorably than content-specific laws.¹⁶⁸ *Daily Mail* and its ilk are distinguishable because (a) the statutes at issue in those cases were content specific,¹⁶⁹ (b) the information published "had been lawfully obtained from the government itself,"¹⁷⁰ (c) the information was already publicly available, and (d) the greater risk of self-censorship resides with the plaintiffs and not the media defendants.¹⁷¹

The statutes survive intermediate scrutiny as applied by the dissenting Justices. The government's "dry up the market" theory is "neither novel nor implausible," and enjoys empirical support "far stronger than mere

¹⁶⁶ See *infra* Part V.A.1.

¹⁶⁷ *Bartnicki*, 532 U.S. at 544–45 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's rationale for applying intermediate scrutiny is based in the Supreme Court's First Amendment precedents. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Contrast Justice Breyer's justification, which predicated intermediate scrutiny on the fact of a "competing constitutional interest[.]" in this case the right of privacy. *Bartnicki*, 532 U.S. at 536.

¹⁶⁸ *Bartnicki*, 532 U.S. at 545 (Rehnquist, C.J., dissenting).

¹⁶⁹ *Id.*; see also Napolitano, *supra* note 2 at 1276. Professor Napolitano differs markedly from the author in his assessment of the desirability of this standard. However, it is noteworthy that Professor Napolitano, writing two years before the Supreme Court decided *Bartnicki*, understood this standard to apply to *content-based* speech restrictions:

The doctrine of state interest of the highest order—which means that the government may curtail the *content* of expressive liberties only when the interests that the government seeks to serve *must* be served at the peril of the demise of *the government itself* if they go unserved and only where the government's interest in self-preservation can be served by *no other means*—offers a consistent, predictable, unifying standard. . . .

Id. (emphasis added).

¹⁷⁰ *Cf. Bartnicki*, 532 U.S. at 546 n.3 (Rehnquist, C.J., dissenting) (acknowledging that *Daily Mail* did not involve information obtained from the government, but noting that the statute at issue in that case categorically banned publication of the information, whereas the statutes at issue in *Bartnicki* prohibited disclosure only if the information was unlawfully obtained).

¹⁷¹ *Id.* at 547 (Rehnquist, C.J., dissenting).

speculation.”¹⁷² The countervailing interest in publication of matters of public importance is, in the dissent’s estimation, unsupported by Supreme Court precedents. Whether newsworthy or not, the participants in the intercepted conversation did not intend to engage in public discourse: “The Constitution should not protect involuntary broadcast of personal conversations.”¹⁷³ Publication of such conversations is not an interest of sufficient magnitude to subordinate the right “to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations.”¹⁷⁴

Like the other Justices, the dissenters noted the speech-inhibiting consequences of the behavior that the statutes were designed to deter.¹⁷⁵ In light of their assessment the *Daily Mail Cases*, and the adequacy of the government’s “dry up the market” theory, it is unsurprising that they disagree with the outcome of the Court’s “balancing.” One searches in vain, however, for the collision of First Amendment theories that the facts of *Bartnicki* precipitate. Both the majority and dissenting opinions cite the following language with approval:

In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one’s speech is being monitored by a stranger, even without the reality of such activity, can

¹⁷² *Bartnicki*, 532 U.S. at 550, 553 (Rehnquist, C.J., dissenting). The empirical case for the efficacy of the statutes is more or less significant depending on the level of review employed by the Court. For the Justices in the majority, applying strict scrutiny, the “dry up the market” theory is just that, theory. Significantly, more often than not, the identity of the interceptor is known. *Id.* at 531 n.15; cf. *New York v. Ferber*, 458 U.S. 747, 760 (1982) (“The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”). The dissent employs this same language from *Ferber*, noting that the Court in that case accepted this “basic syllogism” without any empirical support from Congress. *Bartnicki*, 532 U.S. at 551–52 (Rehnquist, C.J., dissenting). Applying a lower standard of scrutiny, the dissenting Justices would defer to “the reasoned judgment of 41 legislative bodies and the United States Congress.” *Id.* at 552 (Rehnquist, C.J., dissenting).

¹⁷³ *Bartnicki*, 532 U.S. at 554 (Rehnquist, C.J., dissenting).

¹⁷⁴ *Id.* at 555 (Rehnquist, C.J., dissenting). Recasting the Supreme Court’s decisions from *Cox Broadcasting* to *Florida Star*, as the dissenting Justices attempted to do, is certainly one way to tip the scales in favor of privacy. Is it persuasive? The majority conceded, as it must, that the statutes are content-neutral. Yet the *Daily Mail* “principle” is not, by its terms, predicated on the content-specific or content-neutral status of the statute being examined. Moreover, the majority’s requirement that the statutes satisfy a threshold of empirical proof is an unavoidable corollary of the *Daily Mail* strict scrutiny standard. Therefore, a more radical approach will be necessary to empower legislatures sufficiently to meet “the challenges future technology may pose to the individual’s interest in basic personal privacy.” *Id.* at 541 (Breyer, J., concurring).

¹⁷⁵ See *id.* at 542 (Rehnquist, C.J., dissenting) (“[T]he Court’s decision diminishes, rather than enhances, the purposes of the First Amendment: chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day.”).

have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.¹⁷⁶

What does "democratic society" add to the value of "creative," "constructive," and "critical" ideas? In any society, democratic or otherwise, "privacy of communication is essential if citizens are to think and act creatively and constructively."¹⁷⁷ The implication, of course, is that these are the characteristics of good voters.¹⁷⁸

Elsewhere the dissenters rely on something closer to an autonomy-based theory, but in a way that only underscores that it has not been the predominant theory in recent Supreme Court jurisprudence. Chief Justice Rehnquist quotes the following language from *Turner Broadcasting v. FCC*:¹⁷⁹ "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."¹⁸⁰ The facts of *Turner Broadcasting* make that case peculiar precedent for the protection of private conversations. In *Turner Broadcasting*, several large media conglomerates challenged the constitutionality of provisions of the Cable Television Consumer Protection and Competition Act of 1992 requiring cable operators to carry the signals local broadcast television stations.¹⁸¹

Indeed, when placed in context, the language quoted by Chief Justice Rehnquist does not support the proposition for which it is cited. *Content-based restrictions*, the Court maintained, "raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."¹⁸² Such regulations are subject to strict scrutiny precisely because they interfere with the information content in the *public* marketplace. The Court found the regulations at issue in *Turner Broadcasting* content-neutral, and noted that a point in favor of upholding them was the government's avowed purpose to ensure a "multiplicity of information sources."¹⁸³ The Court took this to "promote[] values central to the

¹⁷⁶ *Id.* at 543 (Rehnquist, C.J., dissenting) (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 202 (1967)) (emphasis added); see also *id.* at 533.

¹⁷⁷ Other forms of government may restrict the privacy of conversations *because* it fosters critical thinking, but there is nothing about "democratic societies" that makes the connection between private speech and critical thinking stronger.

¹⁷⁸ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948) ("[Free speech] is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.").

¹⁷⁹ 512 U.S. 622 (1994).

¹⁸⁰ *Id.* at 641.

¹⁸¹ *Id.* at 630.

¹⁸² *Id.* at 641 (internal quotations omitted).

¹⁸³ *Id.* at 663.

First Amendment.”¹⁸⁴ The Court’s solicitude for the free-flow of ideas in the public marketplace, expressed as either a distrust of content-based restrictions or approval of regulations that encourage wider dissemination of ideas, cannot be used to support the interest in private speech.

V. PRIVACY & PRIVATE SPEECH AFTER *BARTNICKI*

A. “Exceptions” to the *Daily Mail Principle*

After *Bartnicki*, is the First Amendment’s victory over privacy absolute? Certainly the constitutional bar has been set high. Courts will continue to disclaim the creation of categorical rules, but they will also continue to place their thumbs on the scale in favor of the First Amendment.¹⁸⁵ However, *Bartnicki* suggests answers to the great “unanswered question” of the *Daily Mail Cases*: Can the press ever be sanctioned for publishing truthful information? First, the right to publish truthful information concerning matters of public importance does not extend to matters of purely intimate significance. Second, there is some suggestion that the government could, without violating the First Amendment, sanction a media outlet for illegal participation in privacy invading activities. This note will explore these possible limitations on the press through two hypotheticals.

Is the Supreme Court absolute in its adherence to one *theory* of First Amendment protection? The discussion of *Bartnicki* demonstrated that collectivist theories still predominate. Discussion of the hypotheticals suggests that the even though the Court will protect privacy at the expense of free speech in certain instances, those exceptions to the *Daily Mail* principle continue to under-serve private speech as such.

1. *Hypothetical One*

Just as lawyers can now expect numerous career changes over the course of their professional lives, so too can rock stars. A sea change in musical tastes leaves Nigel Smalls, lead singer of a formerly popular rock group, at just such a juncture in his life. Nigel looks to movie making to make a fresh start, and familiar with the dictum “write what you know,” he decides to make a film about a subject with which he is intimately familiar. Nigel depicts himself and his famous girlfriend having sex. This first foray into filmmaking was not, however, intended for theatrical release. Nevertheless, Nettarement, a company that

¹⁸⁴ *Id.* However, the Court remanded for a determination of the factual support for the government’s conclusions. *Id.* at 668.

¹⁸⁵ See *Bartnicki v. Vopper*, 200 F.3d 109, 128 (3d Cir. 1999) (“It would be difficult to hold that privacy of telephone conversations are more ‘important’ than the privacy interests the states unsuccessfully championed in [the *Daily Mail*] cases.”).

provides adult entertainment via the Internet, acquires the tape. Nettainment claims to have a license from Nigel that permits it to distribute the film, a claim that Nigel vehemently contests. Nigel therefore brings suit to enjoin the distribution of his "private" home video. Can a court, consistent with the First Amendment, grant the injunction in the interests of protecting Nigel's privacy?

The facts of the foregoing hypothetical are based on *Michaels v. Internet Entertainment Group, Inc.*¹⁸⁶ Michaels asserted, *inter alia*, a right to publicity that protected his interest in his name and likeness from financial exploitation by third parties, and a tort claim for violation of his right to privacy.¹⁸⁷ Courts recognize an exemption from the right to publicity for the use of the name or likeness of an individual in connection with matters of public importance.¹⁸⁸ Similarly, California's privacy tort protects only matters that are not of legitimate public concern.¹⁸⁹

The *Michaels* court appears to have regarded the case as relatively easy: Sex is a fundamentally private matter, and the fame of those depicted does not make it less so.¹⁹⁰ There is reason to believe that the Supreme Court would come to a similar conclusion. The concurring opinion in *Bartnicki* cites *Michaels* with approval,¹⁹¹ the dissenters found the comparatively "un-private" conversation in *Bartnicki* protected, and the majority opinion reserved the question whether the *Daily Mail* principle would apply in the case of private matters.¹⁹² Nigel's right of privacy, unlike the plaintiffs' in *Bartnicki*, would likely prevail over the defendant's First Amendment objections.

Sex is widely regarded as the ultimate of private acts, and concern (judicial and otherwise) for its continued privacy is venerable.¹⁹³ We instinctively recoil at the effrontery of such an invasion,¹⁹⁴ and one anticipates that judges, like the judges in *Michaels* and *Bartnicki*, are possessed of similar sensitivities. Although society's respect for these boundaries can be overstated, invasion of the bedroom

¹⁸⁶ 5 F. Supp. 2d 823 (C.D. Cal. 1998).

¹⁸⁷ *Id.* at 836.

¹⁸⁸ *Id.* at 838.

¹⁸⁹ *Id.* at 839. The analogy to the constitutional issue in *Bartnicki* is self-evident.

¹⁹⁰ *Id.* at 840.

¹⁹¹ *Bartnicki v. Vopper*, 532 U.S. 514, 540 (2001) (Breyer, J., concurring).

¹⁹² *Id.* at 533 ("We need not decide whether that interest is strong enough to justify the application of § 2511(c) to disclosures of trade secrets or domestic gossip or other information of purely private concern.").

¹⁹³ Warren & Brandeis, *supra* note 76, at 196 ("To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.").

¹⁹⁴ See SMOLLA, *supra* note 24, at 128 (suggesting that for the purpose of determining the degree of intimacy, "[m]atters such as family relationships, mental and physical health, love and sexual relationships, procreative decisions, and victimization will probably be regarded by most as acutely private").

is where courts will likely draw the line. Because it is widely regarded as the *ultimate* private act, however, it is difficult to generalize from.¹⁹⁵ The fact that a culture sanctions the taking of life tells one little about whether that same culture will sanction the taking of ideas. Although both fit under the rubric "takings," the egregiousness of the former undermines its predictive value vis-à-vis the latter. A similar problem pertains to the protection of "conjugal privacy": The fact that judges may protect the ultimate private act does not tell us what other acts (if any) are also protected.

It is clear, however, that Nigel's success does not serve First Amendment values grounded in personal autonomy. His success merely demonstrates that at least one non-speech privacy value may survive a contest with the First Amendment *grounded in a democratic theory*. In other words, Nigel's victory stands for the proposition that his sex life does not serve civic values, even broadly conceived.¹⁹⁶ The protection is not extended on the basis of any expressive aspect of the act; it is not a right to say (demonstrate) "I love you" or whatever else the act may "say."¹⁹⁷ Excepting physical intimacy from "matters of public importance" is consistent, or at least not incompatible, with the Supreme Court's First Amendment theory as developed in *Daily Mail et al.* The same can be said for the other limitations on "matters of public importance" proposed by the concurring Justices in *Bartnicki*.¹⁹⁸

Likewise, the possibility that the Court might protect "domestic gossip," although obviously speech-based, does not suggest endorsement of an autonomy-

¹⁹⁵ Cf. *id.* at 127–28 (attempting to "calculate" the degree of intimacy associated with particular personal facts).

¹⁹⁶ A different result would obtain if the act were otherwise construed as a legitimate public matter. See, e.g., *De Gregorio v. C.B.S.*, 473 N.Y.S.2d 922 (Sup. Ct. 1984). In *De Gregori*, broadcast of the plaintiff holding hands with a colleague at work did not violate a New York privacy statute because the "subject matter of the filmed sequence under scrutiny—romance—is of public interest." *Id.* at 924. The possibility of limits to the principle articulated in *De Gregorio* is further undermined by the court's statement, "[a] news documentary, such as the 'Report', which uses films to show people behaving in a 'romantic' fashion, in order to explore the prevailing attitudes on this topic is newsworthy." *Id.*

¹⁹⁷ Protection on that basis is not inconceivable. Professor Baker argued that the First Amendment could be extended to conduct that furthers key First Amendment values (particularly self-realization). See Baker, *supra* note 36, 1009. Under his theory, general prohibitions on sexual behavior between consenting adults (or other substantively valued behavior) constitute "an unconstitutional abridgement of freedom of speech or expression." *Id.* at 1019.

¹⁹⁸ In addition to *Michaels*, the concurring Justices cite authority for the proposition that that "intimate [and] private characteristics or conduct" are not of legitimate public concern. See *Bartnicki v. Vopper*, 532 U.S. 514, 540 (2001) (Breyer, J., concurring) (quoting W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER & KEETON ON LAW OF TORTS § 117 (5th ed. 1984)).

based First Amendment theory.¹⁹⁹ The phrase itself, "domestic gossip," is patently dismissive. The Justices seem to be saying that such speech is of little democratic (or other) value whatever. What might pass among private citizens is therefore either public or inconsequential (or, in the case of trade secrets, "merely" commercially consequential).²⁰⁰ This attitude is antithetical to the belief that free private speech is instrumental to self-realization.²⁰¹

2. Hypothetical Two

Charles Hatfield and Dan McCoy are feuding neighbors. Dan is upset because Charles does not maintain his property; Charles is upset because Dan's floodlights keep him up nights. One reason that Charles is such an indifferent property owner is his love of news and news networks: There is always something happening somewhere in the world more compelling than mowing his lawn. Charles, not surprisingly, is very keen on getting his news as it happens. To that end, Charles purchases a police scanner to monitor police activity in the neighborhood. It turns out that the scanner picks up more than police band radio, and Charles discovers that he is privy to conversations carried on by the McCoy's next door on their cordless telephone.

McCoy conversations contain the usual smattering of mundane and intimate, but also something more: Dan McCoy likes to talk about his job. As a member of the Tug Valley School Board, Dan supervises the purchase of insurance for school district employees. It seems Dan had more than a passing acquaintance with the owners of the insurance companies from which he purchases insurance for the district. Alerted to a potential conflict of interest, and piqued by several unflattering remarks made by Dan about his neighbors, Charles begins taping the conversations. Because the police do not seem concerned about this behavior, Charles contacts the local television station.

Tug Valley Television is very interested in Charles' tapes, but considers them insufficiently newsworthy. So the Station advises Charles to let the story unfold a bit longer, but by all means keep recording. "Don't tamper with the tapes: That will undermine their credibility. Better yet, just let the tape run. In fact, why don't

¹⁹⁹ *Id.* at 533 ("We need not decide whether that interest is strong enough to justify the application of § 2511(c) to disclosures of trade secrets or domestic gossip or other information of purely private concern.").

²⁰⁰ See Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1079 (2002) ("Content-based regulation of expression is suspect when applied to so-called 'high-value' speech like criticism of the government, but is generally permitted (although subject to limitations) in case of low-value speech like private libel, *commercial speech*, profanity, and pornography.") (emphasis added).

²⁰¹ See Baker, *supra* note 36, at 994 ("Generally, any . . . *meaningful* conduct, whether public or private, expresses and further defines the actor's nature and contributes to the actor's self-realization.") (emphasis added).

you send us copies of the tapes as they are made?" The Station's patience paid off in the form of a three-part exposé on corruption within the school board. Dan was later acquitted of all charges, but the ratings were reward enough. Can the television station be sanctioned for encouraging the interception?

Probably so. The facts of the foregoing hypothetical are modeled on events giving rise to the lawsuit in *Peavy v. WFAA-TV, Inc.*²⁰² In that case, the Fifth Circuit found for the plaintiff over the defendant television station's First Amendment objections. The case is distinguishable from *Bartnicki* because the television station "[had] undisputed participation concerning the interceptions."²⁰³ This distinction, the court noted, placed the issue squarely into the category of factual situations expressly *not* confronted by the *Daily Mail* line of cases.²⁰⁴

The Supreme Court denied certiorari.²⁰⁵ Of course, denial of certiorari is not necessarily indicative of the Supreme Court's views on the merits of a case.²⁰⁶ Yet, the plausibility of the Fifth Circuit's interpretation of the Supreme Court's studied refusal to decide this very issue, combined with the separate opinion of Justice Breyer,²⁰⁷ sent a strong signal to lower courts that a media outlet's participation in illegal acts is not protected by the First Amendment.²⁰⁸

Undoubtedly, the Fifth Circuit's decision provides *some* protection. The perpetrators of the invasions giving rise to lawsuits in *Bartnicki*, *Peavy*, and *Boehner* were individual offenders, and in all three instances the invasion was, at least ostensibly, inadvertent. An *institutional* offender, armed with greater resources, a constitutional mandate to listen in on our conversations, and the capacity to disseminate that information broadly, would pose a significantly greater threat. *Bartnicki* does not bring *that* monster to life, but perhaps it creates (or insulates) another.

Bartnicki is a "how to" book for invading privacy and getting away with it. True, the case does not reveal anything like a trade secret: Anonymously

²⁰² 221 F.3d 158, 163–66 (5th Cir. 2000).

²⁰³ *Id.* at 180.

²⁰⁴ *Id.* at 181–82; *see also supra* Part III.A.

²⁰⁵ *Peavy v. WFAA-TV, Inc.*, 532 U.S. 1051, 1051 (2001). Certiorari was denied two days after the Court decided *Bartnicki*.

²⁰⁶ *See* *House v. Mayo, State Prison Custodian*, 324 U.S. 42, 48 (1945) ("[A] denial of certiorari by this Court imports no expression of opinion upon the merits of a case.").

²⁰⁷ *See* *Bartnicki v. Vopper*, 532 U.S. 514, 535–36 (2001) (Breyer, J., concurring) ("I join the Court's opinion because I agree with its 'narrow' holding . . . limited to the special circumstances present here: (1) *the radio broadcasters acted lawfully (up to the time of final public disclosure)*; and (2) the information publicized involved a matter of unusual public concern.") (emphasis added).

²⁰⁸ *See, e.g.,* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) ("The publisher of a newspaper has no special immunity from the application of general laws [and] has no special privilege to invade the rights and liberties of others.") (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937)).

depositing audiocassette tapes in a mailbox is not beyond the ingenuity of even unimaginative individuals. But it does convey to such individuals that whatever damage the content of those tapes inflicts when released to the public is not only not punishable, it is laudable. Help your local television station to carry out its profound constitutional responsibility and preserve the private conversations of your neighbors for posterity! In other words, it says to individuals who have access to the private conversations of others, whether that access is deliberate or inadvertent, "don't change that dial."

It is precisely because such conversations are often intruded upon only inadvertently that this message is so pernicious. In the preceding hypothetical, based on the facts of *Peavy*, the "inadvertence" of the interception is dubious given the ill will among those involved. Similarly, in *Bartnicki* there is reason to suspect that the interception was deliberate. The conflict between the union and the school board was rancorous and well publicized, suggesting that a disinterested individual would recognize the significance of the conversation. However, the anonymous interceptor knew precisely how to utilize the tape for maximum *political* impact.²⁰⁹ Such individuals might be deterred by the unavailability of a media outlet for the intercepted material, bearing out, at least theoretically, the government's "dry up the market" rationale. In the case of genuinely inadvertent interception, by contrast, it does not make sense to talk about deterring the initial interception. However, what *those* individuals do once they discover that they are privy to another's conversation *can* be influenced by the Court's decision. Such individuals should be discouraged from making such information public.

B. *Why the Court's "Mixed Message" Is Ill-timed.*

By invalidating those portions of the Wiretap Acts pertaining to disclosure, the message conveyed by the Acts, "do not participate in illegal interceptions," is mixed with the message, "the product of such information belongs in the public sphere." Thus far, this note has argued that the latter message is a corollary of the Supreme Court's allegiance to collectivist theories of First Amendment protection. Of course, it does not follow that recognition of a competing theory *necessarily* means that theory should win out in a particular case.²¹⁰ However, societal trends render an autonomy-based theory of First Amendment protection especially important.

²⁰⁹ Given Justice Breyer's concern with the threat of violence, if indeed that is a viable interpretation of the remarks in context, an anonymous tip to the police would have been more appropriate.

²¹⁰ The *historical* correctness of a particular outcome is difficult to assess. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) ("The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.").

First, the “democratization of technology”²¹¹ poses a threat to privacy. One consequence is that the high-tech devices, which, in the hands of the government provoke the concern of privacy advocates,²¹² are now available to private individuals. This technology includes the sorts of scanning devices that presumably captured the cellular phone conversations in the aforementioned cases. Increasingly, people are relying on vulnerable communications technologies, for example, e-mail and cellular phones, thereby increasing the number of individuals who are susceptible to invasion.²¹³

Second, the September 11th terrorist attack has placed a premium on security at the expense of privacy.²¹⁴ Bills introduced in the wake of the terrorist attacks increase the ability of the government to listen in on private conversations with even less suspicion of wrongdoing.²¹⁵ This note does not address these threats to

²¹¹ THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 46–53 (2000).

²¹² The flurry of commentary surrounding the FBI’s “e-mail surveillance” system, felicitously labeled (from an author’s perspective) “Carnivore,” is representative of the suspicion with which the government is regarded in the area of privacy. See, e.g., John Lewis, *Carnivore—The FBI’s Internet Surveillance System: Is It a Rampaging E-Mailasaurus Rex Devouring Your Constitutional Rights?*, 23 WHITTIER L. REV. 317 (2001); Frank J. Eichenlaub, Comment, *Carnivore: Taking a Bite Out of the Fourth Amendment?*, 80 N.C. L. REV. 315 (2001); Marciela Segura, Note, *Is Carnivore Devouring Your Privacy?*, 75 S. CAL. L. REV. 231 (2001).

²¹³ See Eichenlaub, *supra* note 212, at 315–16 (“One study estimates that Internet users will send ten billion e-mail messages over the Internet in 2001, rising to thirty-five billion by the year 2005.”). Moreover, the direction of technological development is such that private speech is especially vulnerable. As noted, *communications* technology is both predator and prey in this brave new world. By contrast, one’s cellular phone or computer screen is not (yet) a window into the “private bedroom.” Cf. *Kyllo v. United States*, 533 U.S. 27 (2001) (use of thermal imaging device without a warrant constitutes an unreasonable search in violation of the Fourth Amendment). The concurring opinion in *Bartnicki* shores up traditional bulwarks of privacy (protecting intimate matters) where they are least vulnerable. By contrast, this is where an autonomy-based theory of First Amendment protection would be most vigilant.

²¹⁴ See Kevin Coughlin, *Jerseyans Fear Another Terror Strike—We’d Also Give Up Some Liberties to Ensure Adequate Protection*, STAR LEDGER (Newark, N.J.), Feb. 3, 2002, at 23 (reporting that a poll of New Jersey residents revealed that a “mandatory national identity card strikes 67 percent as an ‘excellent’ or ‘good’ idea” as precaution against future terrorist attacks).

²¹⁵ See Edwin Meese III & Todd Gaziano, *Remove FBI’s Handcuffs*, USA TODAY, Feb. 7, 2002, at A14 (arguing that FBI should be freed of outmoded restraints in fight against terrorism). Just as the states largely followed the federal government’s lead in erecting the privacy protections scrutinized in *Bartnicki*, so too are they influenced by the federal government in the process of lowering those protections in the interests of security. See, e.g., Bill McConico, *Any State Wiretap Law Should Be Tailor-Made*, DETROIT NEWS, Mar. 1, 2002, at 9A (article by Michigan state representative noting the push to expand wiretapping in the wake of September 11); Steve Neal, *Let Feds Handle the Terrorists; Bill That Would Expand Illinois Death Penalty Duplicates Punishment Already on the Books*, CHI. SUN TIMES, Feb. 8,

privacy, nor is it concerned with the advisability of the trade-off, security for privacy. The mere fact of this controversy is sufficient here to demonstrate the increased pressure on private speech. Private speech is being squeezed, both horizontally (from invasive technologies in the hands of private citizens) and vertically (from a government attempting to head-off a new threat). Together, these trends suggest that more people are listening to more private conversations than ever before.

It could be argued that in these troubled times the press should be given *more* license to intrude if it is to be an effective “watchdog.”²¹⁶ This argument is ascendant in the wake of recent events, but it cannot wholly align the interest in private expression with the interests of the press, interests that can be complementary, but are not identical. Citizens *do* benefit when the press monitors the government, but greater leeway to police should not entail greater access to private conversations. Yet this is precisely what the Supreme Court has done by elevating the collective virtues of a free press above the individual virtue of self-expression.

VI. REDEFINING “PUBLIC MATTER” TO PROTECT PRIVATE SPEECH

An autonomy-based theory of First Amendment protection dictates a reconsideration of what constitutes a “public matter.” The “intimate” or private nature of private speech is not always evident from its content. Certainly, the *medium* of Kane’s conversation with Bartnicki evinced a desire to maintain privacy. One is tempted to rely on this concrete fact and eschew the concededly fuzzy delineation of private versus public matters. However, as *Bartnicki* amply demonstrates, expectations of privacy are increasingly unreasonable in a transparent society.²¹⁷ Reliance on “reasonable expectations” is a slippery slope leading to a zone of privacy coterminous with one’s hat size.

So, what exactly was the “content” of the conversation? The majority focused on two aspects of the conversation. First, it looked at the conversation and hypothesized that it would have been “newsworthy” if it had been “made in a

2002, 2002 WL 6446523 (arguing that Illinois should *not* follow the federal government’s lead in enacting laws that could lead to invasions of privacy).

²¹⁶ See THE REPORTER’S COMM. FOR FREEDOM OF THE PRESS, THE PRIVACY PARADOX 15 (Jane E. Kirtley ed., 1998) [hereinafter THE PRIVACY PARADOX] (“To stem this rising tide of secrecy in the name of privacy, journalists must be prepared to make the case for openness and free expression—bedrock principles of our democracy. Unless they do, the inevitable result will be that the public’s right to know will be irrevocably eroded.”).

²¹⁷ See *id.* at 34 (“We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a search—at least where (as here) the technology in question is not in general public use.”) (internal quotation omitted) (internal citation omitted) (emphasis added).

public arena.”²¹⁸ The Court also looked at the subject matter of the conversation in the abstract and concluded that Bartnicki and Kane were engaged in discussion of a matter of public significance.²¹⁹ Justice Breyer’s opinion, in contrast, emphasized of the causticity of the conversation. On his view, the conversation was two-times public: It concerned a matter of public importance and portended a matter of legitimate societal concern (violence).

Discussions of matters of public importance can, however, be intensely felt, personal matters. Moreover, the tenor of discourse will often vary depending on the context. How one might express one’s views in private conversation with a friend or colleague on the incendiary issues of the day (abortion, affirmative action, “the war on terrorism,” etc.) will often be different from how one might express those same views in a public forum. According to the majority in *Bartnicki*, this fact of human interaction is the basis for permitting the deterrence of such interaction in the first place.²²⁰ And the very toxicity of Bartnicki’s language, which Justice Breyer identifies as more evidence of its public import, can itself constitute the “private content” of a conversation.

It is an oversimplification, therefore, to say that any conversation *concerning* a “public matter” is bereft of private aspect. Nor, given the societal trends identified earlier, is it adequate to ignore the private aspect in dogged allegiance to “Fourth Estate” function of the press. It might, however, be argued that this public/private content is more “truthful” or “real,” whereas the public discourse on public matters is “canned,” and the pursuit of “truth” cannot stop at “wall[s] of restrictions erected in the name of protecting personal privacy.”²²¹ A similar argument is advanced in the context of criminal conspiracy.²²² The difference is that what one hopes to bring about, “fully cooked” as it were, by “private” criminal conspiracy is undeserving of protection under any provision of the Constitution.

By contrast, the very “truthfulness” of uncensored conversation is integral to that which the First Amendment protects; if that provision has any basis in personal autonomy. It may not be clear what Kane truly meant by his

²¹⁸ *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

²¹⁹ *Id.* at 535 (“The months of negotiations over the proper level of compensation for teachers at Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern.”).

²²⁰ It is caustic because it is private, newsworthy because it is caustic, and public because it is newsworthy.

²²¹ THE PRIVACY PARADOX, *supra* note 216, at 1.

²²² Some courts consider the spontaneity of co-conspirator hearsay utterances to be evidence of its reliability. *See, e.g., United States v. Ammar*, 714 F.2d 238, 257 n.16 (3d Cir. 1983) (“[M]any of the statements were made under circumstances which indicate spontaneity, decreasing the likelihood of deliberate falsehood.”); *United States v. De Luca*, 692 F.2d 1277, 1284 (9th Cir. 1982) (finding spontaneity of statement indicative of reliability).

statements,²²³ but it is certainly clear what he truly felt.²²⁴ Undoubtedly, Kane would not have used such graphic language in a press conference. After the Court's decision in *Bartnicki*, he may not use such language at all.²²⁵

First Amendment protection for private speech based in personal autonomy is also a limiting principle. Professor Volokh has noted that reliance on "constitutional values" to protect private speech can be used to discourage speech that may, by persuasion or "bullying," discourage others from speaking.²²⁶ The breadth of such a doctrine, however, depends upon whether one views the "constitutional value" at issue as simply a more muscular right of privacy.²²⁷ This note has argued, on the contrary, that the conversation between Bartnicki and Kane should be protected because the First Amendment, grounded in respect for individual autonomy, values *individual expression*. Therefore, the fact that one potential private speaker might be cowed by the rhetoric of another private speaker is not grounds for censoring the second speaker (although some critics of the "marketplace of ideas" theory would permit such a restriction).²²⁸

The restriction imposed upon the press by the policy advocated in this note, by contrast, would not limit individual expression. The tape of the conversation between Bartnicki and Kane was simply imported into the public sphere. Any value in publication, therefore, inhered in the collective interest of the listeners (as voters in the democratic theory,²²⁹ or as "self-realizers" in Professor Redish's theory).²³⁰ This note has instead focused on "speakers"—an approach justified by the societal trend toward transparency.²³¹ The greatest threat to freedom of

²²³ "We're gonna have to go to their homes . . . and blow their porches off" meant one thing to its intended hearer and quite another to the individual who intercepted it, to the radio stations that broadcast it, and to Supreme Court Justices who passed on the constitutionality of laws designed to keep that private comment private.

²²⁴ Baker, *supra* note 36, at 994 (emphasizing "the importance of . . . self-expressive use of speech, independent of any effective communication to others, for self-fulfillment or self-realization.").

²²⁵ When an individual actually (as opposed to hypothetically) uses such language in a public forum, it is no longer "private speech." See, e.g., *Norton v. Glenn*, 797 A.2d 294, 295 (Pa. Super. Ct. 2002) (during and after borough council meeting defendant referred to other public officials as "queers" and "child molesters"). The reputational harm inflicted by the publication of such speech should not justify censorship where the media is exercising a strong form of its checking function and no *private* expression is thereby curtailed. Cf. *id.* at 296–97 (rejecting neutral reporting privilege in Pennsylvania).

²²⁶ See Volokh, *supra* note 44, at 1106–10 (2000).

²²⁷ See, e.g., Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683 (1996) (arguing that the private facts tort is undergirded by First Amendment values and should be strengthened).

²²⁸ See *supra* note 41.

²²⁹ See *supra* note 33 and accompanying text.

²³⁰ See *supra* note 36.

²³¹ See *supra* Part V.B.

expression is in this brave new world is the unchecked importation of private speech into the public sphere, and not a comparatively minor limitation on the press.

